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Supreme Court, U.S.
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No. 99-2036

IN THE

Supreme Court of the United States

GOOD NEWS CLUB, *et al*,

Petitioners,

v.

MILFORD CENTRAL SCHOOL,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE AMICI CURIAE THE NORTHSTAR LEGAL CENTER AND BRONX HOUSEHOLD OF FAITH IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI

Amici have directly experienced the Second Circuit's repeated refusals to enforce the First Amendment and protect private religious expression in the public forums at New York public schools.[1] The Northstar Legal Center represented the Bronx Household of Faith, a church located in New York City, when public school officials refused to rent building space to them for religious meetings, although New York Education Law § 414 opened the schools generally for expressive activities. *Bronx Household of Faith v. Community School*

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[1] Pursuant to this Court's Rule 37.6, *amici* state that no counsel for any party authored this brief in whole or in part, and no person or entity other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of the brief. The Alliance Defense Fund of Scottsdale, Arizona, has contributed to the cost of producing this brief. Both parties have consented to the filing of this brief and the letters of consent are on file with the Clerk's Office.

District No. 10, 127 F.3d 207 (2d Cir. 1997), *cert. den.* 523 U.S. 1074 (1998). Counsel for the Northstar Legal Center also served as co-counsel representing Lamb's Chapel Church before this Court in *Lamb's Chapel v. Center Moriches School District*, 508 U.S. 384 (1993). Counsel also helped litigate an earlier case before the Second Circuit involving essentially the same legal issues raised here, *Travis v. Owego-Apalachin School District*, 927 F.2d 688 (2d Cir. 1991).

Amici write this brief to point out the Second Circuit's persistent deviation from this Court's equal access rulings prohibiting content-based discrimination against religious expression, found in *Widmar v. Vincent*, 454 U.S. 263 (1981) and other cases. Churches like Bronx Household of Faith have suffered because the Second Circuit has not enforced the First Amendment to protect religious expression in the public forums formed in New York public schools by New York Education Law § 414. The amici urge this Court to strongly reverse the Second Circuit's aberrant position on equal access and reaffirm that the First Amendment prohibits the government from excluding religious expression from a forum generally open to the public.

SUMMARY OF ARGUMENT

The decision in this case represents the latest example of the Second Circuit's resistance to protecting religious speakers from content-based exclusion in public forums, as this Court did in the landmark decision of *Widmar v. Vincent*, 454 U.S. 263 (1981). Although the amici supports the arguments by petitioner Good News Club that the school district engaged in unconstitutional viewpoint discrimination in violation of *Lamb's Chapel v. Center Moriches School District*, 508 U.S. 384 (1993), this case fundamentally is one of content-based discrimination in violation of *Widmar*. This Court should rule

that the school district here engaged in content-based discrimination against a religious speaker in a public forum created by New York Education Law §414.

The Second Circuit has on at least four occasions in recent years upheld religious exclusion policies that clearly conflict with *Widmar*. *See, e.g.,Lamb's Chapel v Center Moriches Union Free School District*, 959 F.2d 381 (2d Cir. 1992); *Bronx Household of Faith v. Community School District No. 10*, 127 F.3d 207 (2d Cir. 1997); *Full Gospel Tabernacle v. Community School District #27*, 164 F.3d 829 (2d Cir. 1999) and the case now before this Court. The Second Circuit's misapplication of equal access precedent are legion:

- The Second Circuit has evaded the clear holding of *Widmar* by refusing to recognize that New York Education Law §414 creates a public forum in the state's public schools. Instead, it has distorted the limited forum doctrine to permit public schools to exclude community groups that engage in religious expression from the school buildings by ruling that any exclusion from a forum makes it a "limited forum," no matter how many other speakers or forms of expression the government permits. The Second Circuit's faulty reasoning drains *Widmar* of most protection for religious expression.

- The Second Circuit has openly rejected this Court's mild rebuke in *Lamb's Chapel* that it was misapplying *Widmar* and the limited forum doctrine to justify content-based discrimination by New York public schools against religious speakers.

- The Second Circuit has improperly narrowed the holding of *Lamb's Chapel* to mean that the First Amendment protects only religious "speech" but not religious "worship," even though this Court expressly rejected such a dichotomy in

Widmar.

- The Second Circuit has justified its decisions to exclude religious expression from New York public school forums by relying on an obsolete, pre-*Widmar* decision by a state intermediate appellate court that New York Education Law § 414 requires public schools to deny access to the forum by religious speakers. Yet the state appellate court in *Trietley v. Board of Ed. of Buffalo*, 65 A.D.2d 1, 409 N.Y.S.2d 912, 915 (App. Div. 1978) based its anti-religious interpretation of New York Education Law § 414 on a faulty understanding of the Establishment Clause that this Court rejected in *Board of Education v. Mergens*, 496 U.S. 226 (1990). This Court should rule that the case now before this Court is one of unconstitutional content-based discrimination against religious expression in a public forum, in violation of *Widmar*.

I.

THE SECOND CIRCUIT HAS REPEATEDLY RESISTED APPLYING THIS COURT'S EQUAL ACCESS PRINCIPLES TO PROTECT RELIGIOUS EXPRESSION FROM CONTENT-BASED EXCLUSIONS IN PUBLIC FORUMS.

A. New York Education Law § 414 Creates A Public Forum In New York Public Schools.

This Court should not accept the Second Circuit's erroneous conclusion that New York Education Law §414 creates a "limited public forum" in the state's public schools. In light of *Widmar* and other case, the state law clearly creates a public forum.

Public schools may become public forums for use by the community "if school authorities have 'by policy or practice' opened those facilities for 'indiscriminate use by the general public,' ... or by some segment of the public, such as student organizations." *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 267 (1988), quoting *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 47 (1983).

New York Education Law §414 provides that community residents may use public school facilities for "social, civic and recreational meetings, entertainment events and other uses pertaining to the welfare of the community," *Good News Club v. Milford Central School*, 202 F.3d 502, 504 (2d Cir. 2000). The statute also permits community groups to use public schools for instruction, political meetings, civic forums and community centers. *Lamb's Chapel v. Center Moriches Union Free School District*, 959 F.2d 381, 386 (2d Cir. 1992). Although the state law creates a forum broadly available to the community, the Second Circuit concluded, as it has in earlier cases, that the state law creates only a limited forum. *Good News Club*, 202 F.3d at 508; *Bronx Household of Faith*, 127 F.3d at 215 and *Deeper Life Christian Fellowship v. Board of Education*, 852 F.2d 676, 680 (2d Cir. 1988). Yet this conclusion conflicts with this Court's ruling in *Widmar* and the rulings of virtually every other circuit that has addressed the question of what policies create public forums.

This Court ruled in *Widmar* that the University of Missouri-Kansas City had created a public forum for students by policy. 454 U.S. at 267. The policy in *Widmar* permitted meetings for "political, cultural, educational, social and recreational events," *Chess v. Widmar*, 635 F.2d 1310, 1312 (8th Cir. 1980), which is similar to the language of New York Education Law § 414 that creates the forum at issue in this case. This Court and the Eighth Circuit ruled that the

University of Missouri had created a public forum with an unconstitutional content-based exclusion of religious worship.

Other circuits have ruled that policies similar to the one in *Widmar* and the one in this case create public forums, not limited forums. The First Circuit ruled in *Grace Bible Fellowship v. Maine School Administrative District No. 5*, 941 F.2d 45 (1st Cir. 1991), that a Maine school district had created a public forum when it opened its buildings for meetings by youth groups, community, civic and service organizations, government agencies, educational programs, and cultural events.[2] A school district in Maine rejected a local church's request to rent the high school for an evangelistic outreach that would have included a free Christmas meal and preaching on the true meaning of Christmas because of the event's religious preaching and prayer. The First Circuit ruled that the school district violated the church's First Amendment rights with its policy prohibiting community groups from leasing school facilities "for the direct advancement of religion," calling the school district's actions "censorship," 941 F.2d at 48, and an "elementary violation" of the First Amendment. *Id.*

The Third Circuit ruled in *Gregoire v. Centennial School District*, 907 F.2d 1366 (3rd Cir. 1990), that a suburban Philadelphia school district had created a public forum when it permitted meetings by civic groups, cultural activities, resident service organizations, adult education classes and labor unions. 907 F.2d at 1372-73, 1378-79. The Third Circuit ruled that the school district violated the First Amendment rights of Campus Crusade for Christ when it refused to rent its high school auditorium for a Saturday night evangelistic performance by

[2] The text of the Maine school district's policy does not appear in the First Circuit's opinion, but it was in the record before that Court and is taken from the Brief of Appellees, pps 9-10.

Andre Kole, an evangelist who performs an illusionist show as a vehicle to preach a Christian gospel message to the audience. The Third Circuit declared unconstitutional a policy which prohibited community groups from using school facilities "for religious services, instruction and/or religious activities."

The Fourth Circuit ruled in *Fairfax Covenant Church v. Fairfax County School Bd.*, 17 F.3d 703 (4th Cir. 1994), that a school district had created a public forum by its policy permitting meetings by cultural, civic and educational groups, as well as political organizations. The Fourth Circuit struck down the school district's policy that required churches to pay more than nonreligious groups to rent school buildings.

The Fifth Circuit ruled in *Concerned Women for America v. Lafayette County and Oxford, Mississippi Public Library*, 883 F.2d 32 (5th Cir. 1989), that a public library had established a public forum with its policy permitting meetings of a "civic, cultural or educational character." 883 F.2d at 33-34. The library's policy also expressly excluded religious expression. The Fifth Circuit found the religious exclusion violated the First Amendment when it excluded a woman's prayer group from meeting in the library's auditorium for a group prayer meeting. 883 F.2d at 34.

When this Court and five other circuit courts have faced policies creating forums for speech like the one created by New York Education Law § 414, they have consistently found them to be public forums, not limited forums. This Court should do the same here, so that the school district's exclusion of the Good News Club from the public forum will trigger strict scrutiny by this Court. "Where the State has opened a forum for direct citizen involvement, exclusions bear a heavy burden of justification," *Widmar v. Vincent*, 454 U.S. at 268.

B. The Second Circuit Has Erred By Ruling That New York Education Law §414 Creates Only A Limited Forum.

The Second Circuit has erred by ruling that even one exclusion from a forum generally open to all transforms it into a limited forum. The error started in *Deeper Life Christian Fellowship v. Board of Education*, 852 F.2d 676 (2d Cir. 1988) when the Second Circuit ruled that *Widmar* applied only to public universities and that public schools were not traditionally viewed as public forums. 852 F.2d at 679. Therefore, public schools must be limited forums because they exclude some speakers. "Under the limited forum analysis, property remains a nonpublic forum as to all unspecified uses." *Id.* The Second Circuit has refused repeated requests in later lawsuits to alter this conclusion that New York Education Law §414 creates only a limited forum. *See, e.g., Lamb's Chapel*, 959 F.2d at 381 and *Bronx Household of Faith*, 127 F.3d at 212-14.[3]

However, this Court has never agreed with the Second

[3] The Second Circuit's strange equal access rulings contain a bizarre twist that permits religious expression to meet in a public school forum (even though it is allegedly forbidden by N.Y. Education Law § 414) if the school district had allowed religious groups to use the school facilities in the past, even inadvertently. *See, e.g., Deeper Life*, 852 F.2d at 680 and *Travis*, 927 F.2d at 693. Because of this "error with tenure" corollary, Second Circuit equal access cases frequently degenerate into arguments about whether a Gospel singing concert or a New Age lecture were sufficiently religious to permit more straightforward religious expression, too. *Lamb's Chapel*, 959 F.2d at 387-88. Interestingly, the Second Circuit now has spelled out a process by which school districts can "wash away" the taint of permitting a religious group to meet in the past, so the school district can once again ban all religious expression from its forum. *See Full Gospel Tabernacle v. Community School District #27*, 979 F.Supp. 214, 217-18 (E.D.N.Y. 1997), *aff'd*, 164 F.3d 829 (2d Cir. 1999).

Circuit that a forum that allows a wide spectrum of speech is really only a limited forum if it excludes one thing, like religious expression. In fact, the Second Circuit reverses the proper constitutional analysis that this Court used in Widmar, Perry and other cases -- first, look to see whether the government opens the forum generally for speakers, in order to determine the constitutionality of any exclusion .

Any forum, open or limited, can exclude religious worship and instruction. However, to determine whether the exclusion is constitutional, a court must first determine what kind of forum it is, which means it must look to see whom the policy includes.

If the government permits the community generally to meet there for expressive activities, then it is a public or open forum, and the government must justify its religious exclusion by showing a compelling state interest. *Perry*, 460 U.S. at 45 and *Widmar*, 454 U.S. at 270.

A limited forum is different. This Court stated that if the forum allows only a specific group of people (like students) or a specific subject matter (like school board business) in the forum, then it is a limited forum. *Perry*, 460 U.S. at 45 n.7.

The Constitution treats exclusions from a limited forum more leniently than exclusions from a public forum. They only have to be reasonable. "Control over access to a non-public forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral." *Cornelius v. NAACP Legal Defense and Education Fund, Inc.*, 473 U.S. 788, 806 (1985).

Therefore, one must first look at who is <u>included</u> in the

forum and determine whether it is a public forum "generally open to the public" or a limited forum. Once it has been determined what kind of forum it is, then a court can judge the constitutionality of the exclusions. Simply because a forum excludes a type of speech does not indicate whether the forum is public or limited.

The Second Circuit inverts this process and finds that the existence of even one exclusion makes the forum a limited one. The Second Circuit is flatly wrong when it rules that Education Law § 414 creates a limited forum because it excludes religious expression, even though it allows a broad array of speech like the forum did in *Widmar* and other cases. The Second Circuit's insidious twist on the public forum analysis gives government entities a way to gerrymander their forums to exclude disfavored speakers. If they allow everyone in the community to speak in the forum, except those with religious messages, then the forum is a "limited forum," where the exclusions only have to be reasonable, not compelling as *Widmar* requires. The Second Circuit's analysis nullifies the First Amendment protections found in *Widmar* and allows the government to discriminate against religious speakers.

If the Second Circuit's view of equal access law were correct, then religious groups could never prove a content-based exclusion. If a forum excludes religious speech, the school district can say it has a "limited forum," limited to everything but religious worship and instruction. In fact, under the Second Circuit's reasoning, this Court wrongly decided *Widmar*. The University in *Widmar* could have claimed that it really ran a "limited forum," based on subject matter. The limitation would have been, "all topics and subjects are permitted, except religious speech." This Court rightly rejected that cramped view of First Amendment protections against content-based exclusions from public forums.

This Court in *Mergens* warned against governmental manipulation of open forum terminology to exclude disfavored groups, which is exactly what the Second Circuit has approved:

> A public secondary school cannot simply declare that it maintains a closed forum and then discriminate against a particular student group on the basis of the content of the speech of that group.

Mergens, 496 U.S. at 245. Therefore, the Second Circuit has contorted the equal access doctrines to claim that government may exclude religious speakers because the exclusion itself demonstrates that the forum is limited.

Oddly, the Second Circuit has understood equal access law correctly in other contexts not involving religious speech. In *New York Magazine v. Metropolitan Transit Authority*, 136 F.3d 123 (2d Cir. 1998), the Second Circuit agreed that one exclusion from a forum generally open to the pubic does not turn it into a limited forum:

> However, it cannot be true that if the government excludes any category of speech from a forum through a rule or standard, that forum becomes *ipso facto* a non-public forum, such that we would examine the exclusion of the category only for reasonableness. This reasoning would allow every designated public forum to be converted into a non-public forum the moment the government did what is supposed to be impermissible in a designated public forum, which is to exclude speech based on content. *See Cornelius*, 473 U.S. at 813-814, 105 S. Ct. at 3455 (Blackmun, J. dissenting).

> We cannot interpret the Supreme Court's jurisprudence such that it would eviscerate the Court's own articulation of the standard of scrutiny applicable to designated public fora.

New York Magazine, 136 F.3d at 129. Here, the Second Circuit totally contradicts what it has said in *Deeper Life, Travis, Lamb's Chapel* and *Bronx Household of Faith* that one exclusion transforms a place into a limited forum, not a public forum with an unconstitutional content-based exclusion. This Court should emphatically reverse the Second Circuit incorrect rulings that end up denying speakers their right to equal access to a governmental forum merely because of the religious content of their speech.

C. The Second Circuit Has Rejected This Court's Statement in *Lamb's Chapel* That New York Education Law §414 Probably Creates A Public Forum.

This Court strongly indicated in *Lamb's Chapel* that the Second Circuit has erred with its rulings that N.Y. Education Law §414 (and a school district policy based on the law) creates only a limited forum and not a public forum.

> The Church argued below that because under Rule 10 of the rules issued by the District, school property could be used for such a wide variety of communicative purposes that restrictions on communicative uses of the property were subject to the same constitutional limitations as restrictions in traditional public fora such as parks and sidewalks. Hence, its view was that subject-matter or speaker exclusions on District property were required to

> be justified by a compelling state interest and to be narrowly drawn to achieve that end (citations omitted). Both the District Court and the Court of Appeals rejected this submission, which is also presented to this Court. **The argument has considerable force,** for the District's property is heavily used by a wide variety of private organizations .... We need not rule on this issue ....

Lamb's Chapel, 508 U.S. at 392 (emphasis added).

The Second Circuit rejected the "anvil-like hint" (*Bronx Household of Faith*, 127 F.3d at 212) dropped by this Court in *Lamb's Chapel* to the Second Circuit that it had erred. The Second Circuit refused to reverse its earlier rulings that N.Y. Education Law §414 creates only a limited forum, and continues to rule that way as it did in the case now before this Court. *Bronx Household of Faith*, 127 F.3d at 212-13 and *Good News Club,* 202 F.3d at 508-9.

This Court needs to deal strongly with the Second Circuit's defiance. This is not a situation in which the Second Circuit has made one aberrational decision that its judges will correct in some future case. The Second Circuit has repeatedly refused to apply this Court's equal access decisions in *Widmar, Mergens* and *Lamb's Chapel*, and has openly refused to "take the hint" this Court gave in *Lamb's Chapel* that New York law does indeed create an open forum with a content-based exclusion of religious speech. It is time for this Court to send a stronger message to the Second Circuit to follow the law by empathically reversing the decision below.

II.

THE SECOND CIRCUIT'S DECISION CREATES AN UNCONSTITUTIONAL DISTINCTION BETWEEN "RELIGIOUS SERVICES AND INSTRUCTION" AND "RELIGIOUS DISCUSSION"

The Second Circuit has wrongly construed *Lamb's Chapel* to protect only religious speech but not religious worship. See *Good News Club*, 202 F.3d at 510. Such reasoning clearly conflicts with *Widmar*, in which this Court rejected the argument that religious worship receives less protection under the First Amendment than religious speech:

> Here UMKC has discriminated against student groups and speakers based on their desire to use a generally open forum to engage in **religious worship** and **discussion**. These are forms of speech and association protected by the First Amendment.

Widmar, 454 U.S. at 269 (emphasis added).

In *Widmar*, this Court devoted an extensive footnote explaining that religious worship and religious speech are both equally protected under the Free Speech Clause, giving three reasons. *See Widmar*, 454 U.S. at 269, n. 6.

The first reason this Court gave rejecting the distinction was that there is no intelligible way to distinguish between "religious speech" and "religious worship":

> There is no indication when "singing, hymns, reading scripture, and teaching biblical principles," *post* at 283, cease to be "singing, teaching and reading" -- all apparently forms of "speech," despite their religious subject matter -- and become unprotected "worship."

Widmar, 454 U.S. at 269, n. 6.

The second reason why this Court in *Widmar* refused to make a constitutional distinguish between "protected" religious speech and "unprotected" religious worship is that the government and courts would have to delve deeply into a religious group's affairs in violation of the Establishment Clause in order to make the distinction:

> Second, even if the distinction drew an arguably principled line, it is highly doubtful that it would lie within the judicial competence to administer (citations omitted). Merely to draw the distinction would require the university -- and ultimately the courts -- to inquire into the significance of words and practices to different religious faiths, and in varying circumstances by the same faith. Such inquiries would tend inevitably to entangle the State with religion in a manner forbidden by our cases (citations omitted).

Widmar, 454 U.S. at 269, n. 6.

The third reason this Court gave in *Widmar* was that there is no good reason to protect "religious speech" only and not protect "religious worship" under the Constitution.

> Finally, the dissent fails to establish the *relevance* of the distinction on which it seeks to rely. The dissent apparently wishes to preserve

> the vitality of the Establishment Clause. *See, post* at 284-285. But it gives no reason why the Establishment Clause, or any other provision of the Constitution, would require different treatment for religious speech designed to win religious converts, *see Heffron, supra*, than for religious worship by persons already converted. It is far from clear that the State gives greater support in the latter case than in the former.

Widmar, 454 U.S. at 269, n. 6.

This Court repeated this principle in its majority opinion of *Capitol Square Review Bd. v. Pinette*, 515 U.S. 753 (1995):

> Indeed, in Anglo-American history, at least, government suppression of speech has so commonly been directed *precisely* at religious speech that a free speech clause without religion would be *Hamlet* without the prince. Accordingly, we have not excluded from free-speech protections religious proselytizing, *Heffron, supra*, at 647, **or even acts of worship**, *Widmar*, supra at 269, n. 6.

Pinette, 515 U.S. at 760 (emphasis added).

By upholding policies that protect religious speech but ban religious worship, the Second Circuit apparently thinks this Court ruled in *Lamb's Chapel* that the Constitution protects religious speech more than it does religious worship. But *Lamb's Chapel* in no way overruled *Widmar*. The decisions complement each other and are not in conflict. Although this Court resolved *Lamb's Chapel* on the basis of viewpoint discrimination, this Court did not intend for *Lamb's Chapel* to

nullify its earlier ruling in *Widmar* that the Free Speech Clause equally protects religious worship and religious speech. The Second Circuit needlessly pits *Lamb's Chapel* against *Widmar*, and creates confusion in this area of First Amendment jurisprudence. This Court should reverse the Second Circuit's false dichotomy of protected religious speech and less-protected religious worship.

III.

THE SECOND CIRCUIT BASES ITS DECISIONS ON AN OBSOLETE STATE INTERMEDIATE APPELLATE COURT DECISION

The Second Circuit has based its myriad misapplications of this Court's equal access decisions on the obsolete reasoning of a pre-*Widmar* state intermediate appellate court decision from New York, *Trietley v. Bd. of Ed. of Buffalo*, 65 A.D.2d 1, 409 N.Y.S.2d 912 (App.Div. 1978). The Second Circuit relied on *Trietley* in its first major equal access case after *Widmar*, *Deeper Life Christian Fellowship v. Board of Education*, 852 F.2d 676 (2nd Cir. 1988), and has followed its deficient reasoning in subsequent cases. *Lamb's Chapel*, 959 F.2d at 387. *Trietley* has spurred persistent litigation over the application of this Court's equal access cases to New York Education Law §414 because of its erroneous interpretation of the First Amendment, especially the Establishment Clause.

Trietley involved high school students seeking permission to hold a student-led Bible study in the public high school. School officials refused to permit it, and the students sued, seeking access under the language of New York Education Law §414 and the First Amendment. The New York state court ruled against the students and rejected their First Amendment claims.

The court in *Trietley* reached the First Amendment issues mainly because the wording of Education Law §414 does not forbid religious worship or instruction. Because the case involved religious expression in a public school, the New York appellate court incorrectly assumed that the case should be resolved under the Establishment Clause case, not the Freedom of Speech Clause. That court concluded that permitting a student-led Bible study in a public school would violate the Establishment Clause. *Trietley*, 409 N.Y.S.2d at 916-17.

Three years later, this Court in *Widmar* ruled that equal access cases should be decided on the basis of freedom of speech, not the Establishment Clause basis that *Trietley* used. *Widmar*, 454 U.S. at 274. This Court again rejected those Establishment Clause arguments against equal access in *Bd. of Ed. v. Mergens*, 496 U.S. 226, 250 (1990). *Mergens* ruled that public schools could not ban meetings of student-led religious clubs.

That means that this Court has rejected *Trietley*'s Establishment Clause reasoning in *Widmar* and *Mergens*, and *Trietley*'s result in *Mergens*. In light of *Widmar* and *Mergens*, *Trietley* is no longer good law, because it converts Education Code §414 into a public forum with an unconstitutional content-based exclusion of religious worship and instruction.

This Court could abandon *Trietley* as the definitive interpretation of Education Law § 414 because it is not a decision by the highest court in New York, the Court of Appeals, but an opinion by one of the intermediate appellate courts. If this Court decides that it must continue to view *Trietley* as the definitive state court interpretation of New York Education Law §414, then this Court should declare New York

Education Law § 414 unconstitutional because of its content-based exclusions of religious speakers.

CONCLUSION

For the reasons expressed above, amici respectfully ask this Court to reverse the judgment of the Second Circuit.

Respectfully submitted,

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